COURT OF APPEALS
DECISION
DATED AND FILED

May 27, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

No. 98-0833

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

MID-PLAINS, INC.,

PETITIONER-RESPONDENT,

V.

PUBLIC SERVICE COMMISSION OF WISCONSIN,

RESPONDENT-APPELLANT,

KMC TELECOM, INC. AND TDS DATACOM, INC.,

INTERESTED PARTIES,

TDS METROCOM, INC.,

INTERVENOR.

APPEAL from orders of the circuit court for Dane County: RICHARD J. CALLAWAY, Judge. *Affirmed in part and reversed in part.*

Before Dykman, P.J., Eich and Vergeront, JJ.

EICH, J. The Public Service Commission has appealed various circuit court orders in this dispute over the 1997 applications of two telecommunications utilities, KMC Telecom and TDS Datacom, to provide telephone service in an area on the western fringe of Madison which was then being served by Mid-Plains, Inc., under a "certificate of authority" issued by the Commission.[1] The Commission ruled—after inviting and receiving written comments and arguments on the subject from Mid-Plains and others, but without holding a hearing—that Mid-Plains had consented to the competitors' entry into its service area. According to the Commission, that consent was found in a "Regulatory Plan" Mid-Plains prepared and filed in support of an earlier request to the Commission for relief from various regulatory requirements pursuant to statutes providing for the partial deregulation of telecommunications utilities.

Mid-Plains sought judicial review of the Commission's order. The circuit court reversed, concluding that the documents relied on by the Commission in support of its determination that Mid-Plains had consented to entry (and had also waived a federal-law "exemption" from various utility deregulation laws) were ambiguous, and remanded the case to the Commission to hear and re-determine those issues. Additionally—and apparently at Mid-Plains's request—the court ruled that Mid-Plains possessed a constitutionally-protected "property" interest in its certificate of authority (and in the federal exemption) which, under the due process clause, could not be taken away without a hearing. In a later

[1] Until the "deregulation" amendments of the early 1990's, telephone utilities operated under "indeterminate permits" in given areas. Section 196.50(2), STATS., enacted at that time, provided a new treatment: any past permits, franchises or licenses were converted into certificates of authority. Among other things, the statute states that every such certificate "is statewide and nonexclusive," and that its existence or issuance "shall not preclude the commission from authorizing additional telecommunications utilities to provide the same or equivalent service or to serve the same geographical area as any previously authorized utility…." Section 196.50(2)(g)1.

order, issued in response to a "clarification" request from Mid-Plains, the court reiterated both rulings. The Commission appeals both orders, focusing its argument on the court's "property-right" conclusions. With the exception of a "mootness" argument, Mid-Plains's brief is also limited to that issue.

Arguing that the case is moot, Mid-Plains points out that the Commission held hearings and re-determined the consent/waiver issue pursuant to the circuit court remand—deciding all issues against Mid-Plains—and that, thereafter, "Mid-Plains subsequently reached a voluntary settlement with TDS … and KMC" with respect to their applications to provide telecommunications service in Mid-Plains's territory. As a result, says Mid-Plains, any further determinations by this court—particularly a determination with respect to the circuit court's "property-right" ruling—can have no effect on an existing controversy between the parties. Responding, the Commission disputes the latter assertion. It points out that Mid-Plains has filed a lawsuit against individual members of the Commission, claiming that they violated the company's constitutional rights by proceeding to consider—initially at least—TDS's and KMC's applications without a hearing, and seeking money damages. And it says that an appellate determination as to whether such a constitutional right exists (*e.g.*, whether Mid-Plains has a protected property right in its certificate and federal exemption) will have a substantial, if not controlling, effect on that litigation.

We agree that any appeal from that portion of the circuit court's order remanding the case to the commission for re-determination of the waiver and consent issues is moot. Not only have those hearings been held—with Mid-Plains's full participation—but a decision has been made, and an order issued, by the Commission determining that Mid-Plains had consented to TDS's and KMC's

entry into its service territory.[2] And that determination is final in that it was never appealed to the circuit court.[3]

We are also satisfied that, in light of the circuit court's remand, any consideration of whether Mid-Plains had a constitutionally-protected interest in either its certificate of authority or its federal exemption was premature and should not have been reached by that court. The constitutional issue would arise only if Mid-Plains had *not* consented to entry and waived its exemption, for one who has voluntarily consented to relinquish an interest can hardly be heard to claim that he or she has been unconstitutionally deprived of that interest. Indeed, the property-rights issue appears to persist in these proceedings primarily because of its relationship to Mid-Plains's other lawsuit against the individual Commissioners. It is a well-accepted rule that, "as a matter of judicial prudence, a court should not decide [a constitutional issue] unless it is essential to the determination of the case before it." ***Kollasch v. Adamany***, 104 Wis.2d 552, 561, 313 N.W.2d 47, 51 (1981). That such prudence should have been exercised in this case is apparent from the fact that, given the circuit court's remand order—and the unchallenged resolution of the remanded issues by the Commission—the only *raison d'être* for the parties' pursuit of a constitutional issue on this appeal is the other lawsuit.

With respect to this case, the circuit court's premature and unnecessary statements and rulings with respect to Mid-Plains's constitutional argument constitute *obiter dicta* without legal or precedential effect. *See* ***State v.***

[2] The Commission also ruled that Mid-Plains did not possess a property interest in either its certificate of authority or its federal exemption.

[3] Mid-Plains filed a petition for judicial review which was dismissed on March 17, 1999. However, Mid-Plains reached a settlement with TDS and KMC after the Commission's ruling and did not appeal the dismissal of its petition.

Sartin, 200 Wis.2d 47, 60 n.7, 546 N.W.2d 449, 455 (1996) ("[d]icta is a statement or language expressed in a court's opinion which extends beyond the facts in the case and is broader than necessary and not essential to the determination of the issues before it"). *See also*, ***Steinke v. Steinke***, 126 Wis.2d 372, 382, 376 N.W.2d 839, 844 (1985) (dicta has no precedential effect). Nor, we believe, can a *dictum* be in any way considered "the law of the case."[4]

The nature of Mid-Plains's interest in its certificate of authority, or in its federal exemption, is wholly immaterial if the company has voluntarily relinquished that interest. It follows that the circuit court's purported ruling on that subject is a nullity in light of its remand of the issue to the Commission, and the Commission's unchallenged determination that Mid-Plains had indeed consented to competitors' entry into its service area (and had waived the federal exemption) in the plan it filed with the Commission as part of its successful de-regulation application.

We therefore affirm the circuit court's order insofar as it remanded the case to the Commission for further hearings on the waiver/consent issue (indeed, the Commission does not challenge that ruling on this appeal). To the extent the court has ruled on the premature "property-interest" claim, however, we reverse. As we have held, that ruling is a nullity.

By the Court.—Orders affirmed in part and reversed in part.

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[4] While we have found no Wisconsin case stating such a rule with particularity, it appears to be the rule in the great majority of states. *See*, for example: ***People v. Neely***, 82 Cal. Rptr.2d 886, 897 (Cal. App. 1999); ***Memphis Publ'g Co. v. Tennessee Petroleum Underground Storage Tank Bd.***, 975 S.W.2d 303, 305 (Tenn. 1998); ***Edgewater Beach Owners Ass'n, Inc. v. Board of County Comm'rs***, 694 So.2d 43, 45 (Fla. App. 1997); ***Koske v. Townsend Eng'g Co.***, 551 N.E.2d 437, 443 (Ind. 1990); ***Blanchard v. Kaiser Found. Heath Plan***, 901 P.2d 943, 946 (Ore. App. 1995); ***Huckabay v. Irving Hosp. Auth.***, 879 S.W.2d 64, 66 (Tex. App. 1993); ***DeBry v. Valley Mortgage Co.***, 835 P.2d 1000, 1003 (Utah 1992); ***Feller v. Scott County Civil Serv. Comm.***, 482 N.W.2d 154, 159 (Iowa 1992).

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